



NEWSLETTER

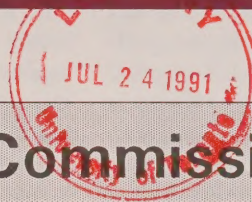


Information and Privacy Commissioner / Ontario

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Introduction To The New Commissioner

Tom Wright was appointed Information and Privacy Commissioner/Ontario on April 25, 1991. The following interview was conducted to introduce the new commissioner to NEWSLETTER readers.

Q: What is the role of the Commissioner?

A: As I see it the role of the Information and Privacy Commissioner is basically threefold -- to review decisions made by governments regarding access to information; to ensure that governments are protecting the privacy of individuals by correctly using the personal information they have in their custody; and to educate the public about the provincial and municipal *Acts* so that citizens of Ontario are aware of the rights given to them by the legislation.

Q: What contributions do you hope to make as Commissioner?

A: I feel very fortunate. I have an excellent staff and a sound organization upon which to draw. My contribution will be largely a "building" one -- building on the solid work of the past three years. I hope to be able to concentrate on the "big picture", being ever mindful that one of our challenges is to uphold the two separate values of access and privacy. And, when necessary, to strike the proper balance between the public's right to know and an individual's right to confidentiality of personal information.

We have worked hard to achieve the strong level of commitment that currently exists at the provincial government level. I look forward to working closely with municipal institutions in order to foster the same spirit

of openness at the local level across the province.

Q: How do you feel your previous experience prepares you for your term as Commissioner?

A: I was called to the Bar of Ontario in 1975. I practised with several law firms before opening my own practice in Kincardine, Ontario in 1980. I had a general practice with an emphasis on family law and litigation matters. My provincial experience came later when I joined the Ministry of the Attorney General's Support and Custody Enforcement Branch as Senior Solicitor in 1986.

I feel my particular blend of background and experience in both the municipal and provincial areas is key to my role as Commissioner. On the one hand, having lived and worked in several smaller communities, where I dealt with local issues in my law practice and represented municipalities in legal matters, I feel I have an appreciation for the municipal perspective. On the other hand, having worked in a large ministry, I am familiar with some of the intricacies of the provincial government. I believe this experience gives me a solid awareness of the structure, roles and responsibilities of both levels of government which is crucial to our work with the provincial and municipal *Acts*.

I should also mention my background with the Office of the Information and Privacy

Commissioner. In January 1988, I became the IPC's first Director of Legal Services and in January 1990, I was appointed Assistant Commissioner (Access). As Assistant Commissioner, I was the agency's spokesperson on legal and access to information policy issues and I also acted as the final decision-maker for appeals filed under the *Freedom of Information and Protection of Privacy Act, 1987*. Having been with the agency from day-one, I have seen the office develop into a mature and experienced organization and feel confident in both our resources and our direction.

Q: What significant developments, in your opinion, have occurred over the past 3 years?

A: I have noted that freedom of information and privacy issues are being addressed with a growing sensitivity and skill. Provincial government institutions and coordinators are to be commended on their level of co-operation with the IPC and their commitment to the principles of the legislation. I should also note the co-operation from staff at the Freedom of Information and Privacy Branch of Management Board of Cabinet.

The IPC was involved in preparing for the three year review of the provincial legislation by the Standing Committee on the Legislative Assembly. We prepared a two volume report containing comments and suggestions on the workings of the provincial *Act*.

New Commissioner (cont'd)

I am pleased to say that we were successful in meeting our objective of raising the profile of privacy-related issues. **HIV/AIDS: A Need for Privacy** was released during 1990, and included our recommendations regarding anonymous testing, non-nominal reporting and partner notification. It is gratifying to note that our recommendations are being translated into government policy.

We also made our views known to the government regarding its proposed use of the new Ontario health number, which was developed to replace the OHIP number. The IPC was effective in sensitizing the government to the need for legislation to control the use of the new health number in both the public and private sectors. The Ministry of Health accepted our privacy-related concerns, and introduced the *Health Cards and Numbers Control Act* to address them.

Q: Briefly, what privacy/access issues will you be addressing in the near future?

A: We will be addressing a number of issues that have to do with new developments in the exchange of information. This exchange of information can involve both personal information and general government records and therefore affects such areas as workplace privacy and electronic records.

An exchange of information can take place on many levels; within an institution, from one institution to another, from the public to the private sector or vice versa, or from one country to another. To illustrate, the European Community will be establishing new rules dealing with the exchange of information across borders. In many European countries, both the public and the private sector are bound by privacy protection codes, much like the ones found in our *Acts*. Companies and governments in North America who want to do business with members of the European Economic Commu-

nity will need to have privacy standards in place that are acceptable to the EEC.

The issue of "workplace privacy" refers to concerns that arise when business efficiency runs up against the individual rights of employees in the workplace. Some businesses are resorting to techniques such as electronic surveillance in the workplace in order to increase efficiency and productivity. It is the IPC intention to examine, and report on the extent to which these practices exist in Ontario today. In 1992, we plan to offer recommendations to both provincial and municipal governments regarding the IPC findings.

Q: What message would you like to leave with us?

A: I believe that the attitude of governments toward the rights of the public regarding access to information is one of the most critical elements in the success of the *Acts*. Therefore, I am looking forward to working with the municipalities to build the same type of commitment to the principles of the legislation as has been developed at the provincial level.

I understand that the implementation of the municipal *Act* on January 1, 1991, has presented new challenges and opportunities for local governments. With this in mind, I look forward to visiting local communities in order to meet with those involved with the legislation and members of the public. Their views and ideas are vital to establishing the future direction of the IPC, and ultimately critical to the success of the municipal *Act*.

The challenges ahead are significant, but I feel that the opportunities to foster change in attitudes toward open government and privacy protection are exhilarating and will guide the IPC in discharging our responsibilities in the years ahead.

Compliance Investigation Procedures

The *Freedom of Information and Protection of Privacy Act, 1987*, and the *Municipal Freedom of Information and Protection of Privacy Act, 1989*, share a common purpose as set out in subsection 1(b) of both *Acts* -- to "protect the privacy of individuals with respect to personal information about themselves". The Information and Privacy Commissioner is appointed to perform the duties prescribed by the *Acts*, and is therefore responsible for upholding compliance with the privacy provisions therein.

In order to discharge this responsibility, the Office of the Information and Privacy Commissioner (IPC) conducts investigations into compliance matters. These investigations frequently occur as a result of complaints received from members of the public who feel an institution has wrongfully collected, retained, used or disclosed their personal information.

To ensure fairness to both the complainant and the institution, as well as consistency in IPC reporting, the compliance investigation procedures have recently been reviewed and refined. The revised procedures ensure that all investigations are conducted in a way that meets appropriate standards of fairness.

The new procedures recognize that parties to any investigation must be given timely notice of the significant aspects of the case, and that parties are provided with the opportunity to respond to questions that arise during the course of the investigation. Investigations are divided into nine major phases.

1. Receipt of Complaint
2. Clarification of Complaint
3. Determination of Jurisdiction
4. Acknowledgement and Notification
5. Identification of Issues
6. Investigation
7. Preparation of Draft Report
8. Release of Draft Report to Complainant and Institution
9. Release of Final Report

For further details regarding the compliance investigation process, please contact the IPC.



Upcoming Conference

October 24 and 25, 1991 in Toronto

Key Challenges: Information and Privacy Issues, is an access and privacy conference co-sponsored by Management Board Secretariat, Office of the Information and Privacy Commissioner/Ontario, and The Institute of Public Administration of Canada (IPAC). For details, contact Jane Serrano or Joe Galimberti at IPAC, 897 Bay Street, Toronto, Ontario, M5S 1Z7. Phone (416) 923-7319.

This conference features keynote speakers and workshops on access and privacy topics. The sessions will challenge the audience to delve into the many practical and ethical aspects of access and privacy issues, and will be of particular interest to both provincial and local freedom of information co-ordinators.



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Workplace Privacy

It has become apparent to many in the privacy community that a number of workplace-related issues are arising as matters of concern. The Office of the Information and Privacy Commissioner (IPC) takes these concerns seriously and has turned its attention to the issue of workplace privacy.

Reports indicate a growing number of incidents where business efficiency is running up against the individual rights of employees in the workplace. Business is interested in increasing labour efficiency and productivity, often at the expense of the privacy of employees.

Some businesses are increasingly resorting to techniques such as electronic surveillance, psychological testing, polygraph testing, DNA testing and testing for the presence of drugs and alcohol. Many seek access to sensitive personal information including medical, financial and criminal history -- all in the cause of improvements to the "bottom line".

Some of these matters may not yet be of concern in Ontario while others, like electronic surveillance, are already causing a certain amount of apprehension among employees and unions. They impact on a wide spectrum of interests, including organized labour and law enforcement agencies. They touch upon employment standards, human resources practices, and even have implications for the medical community.

One such matter which the IPC is addressing concerns electronic surveillance, a practice which can cover many facets of a workplace. Cameras can record the activities of a team or an individual on the job. They can record such details as: how many pieces are moved down an assembly line; how fast the product can be assembled; and how many word processing documents can be processed over a period of time.

Computers can permit a supervisor to know how many keystrokes an individual is averaging an hour and whether that number meets the minimum performance standard for the workplace. A supervisor can monitor an employee's output from the time he or

she logs on until logging off, or the number of calls a telephone operator completes in a given period. Advances in technology have even eliminated the need for any physical presence by the supervisor.

A number of employers have programs in place where workers are routinely screened for the presence of drugs and alcohol. A number of companies in the United States make immediate drug testing a condition of employment. This is a practice which is becoming accepted by some organizations in Canada.

The federal government has proposed the testing of workers involved in critical transportation functions such as those driving long distances, or pilots and air traffic controllers. This raised a storm of controversy last year when it was announced. The need to prevent driving under the influence of drugs and alcohol is beyond dispute. However one must consider whether intrusive medical practices such as drug testing, are sufficiently reliable and effective tools to address the problem, and whether they outweigh the invasion of individual privacy.

Genetic testing is another controversial trend that is beginning in the United States. Some employers are engaged in testing current and potential employees for any genetic predisposition to disease. For example, a worker who has a predisposition to developing cancer, respiratory disease or kidney malfunctions, is a poor risk for an employer's medical insurance scheme, and a poorer choice for a company where substances in the workplace might combine with such a tendency to bring about the disease. Not only is such a practice highly intrusive and clearly an invasion of an individual's right to privacy, but it also suggests concerns involving health and safety in the workplace and employment standards.

And finally, there are the issues surrounding psychological testing of employees, where organizations who screen current and potential employees for desirable personality traits. Psychological profiles, handwriting analysis, role playing and simulated case histories are all tools used by

human resources professionals and recruiting firms to meet the needs of business leaders.

The impact of technology need not be negative. The facsimile machine is a clear example. However, while the fax has changed the way one communicates with colleagues and associates, and although the fax is an efficient means of transmitting information, its potential for misuse is considerable. Fax transmissions may be tapped or intercepted. Confidential information may fall into the wrong hands simply by misdialling a telephone number. The guidelines issued by the IPC last year addressed many of these security issues related to the facsimile machine. As technology advances, so do the opportunities for the potential invasion of privacy in the workplace.

The potential for privacy exploitation exists for other intrusive practices which are extolled as methods by which business can eliminate unnecessary labour costs, increase profit margins, expand levels of productivity and maximize labour input. These may be valid concerns, however their introduction into the workplace needs closer examination.

This year, the IPC will be focusing its efforts by consulting with provincial ministries and agencies, bringing concerns to their attention and beginning the process of investigating the true state of affairs in Ontario.

The IPC plans to prepare research papers on the fore-mentioned issues, reviewing literature, examining practices and any case histories that might be available. Once these papers are completed, the IPC proposes to consult with interested individuals and stakeholder groups. Members of the public will also be provided with an opportunity to comment.

Finally, by 1992, the IPC will be in a position to make any necessary recommendations to provincial and municipal governments regarding its findings. This is a complicated field, with a great many different interests and issues to be taken into consideration. The IPC will engage in considerable consultation and debate on what are some of the most pressing concerns facing the privacy community today.

Guidelines on the Use of Verbatim Reporters at Administrative Hearings

There are a number of institutions governed by the *Acts* that use the services of verbatim reporters to record proceedings of administrative hearings and inquiries. The records generated by these verbatim reporters may contain personal information, and consequently may fall under the privacy provisions of the *Freedom of Information and Protection of Privacy Act, 1987*, or the *Municipal Freedom of Information and Protection of Privacy Act, 1989*.

It has become apparent that, in some instances, the procedures employed by institutions in retaining control of records generated by verbatim reporting services could be improved. Therefore the Office of the Information and Privacy Commissioner has prepared a set of guidelines for institutions to consider when using the services of verbatim reporters.

The main purpose of the **Guidelines on the Use of Verbatim Reporters at Administrative Hearings** is to offer advice to institutions with respect to the custody and/or control and disposal of records related to hearings, and thus comply with the requirements of the *Acts*. The main focus of these guidelines is on the need for institutions to incorporate privacy-related requirements into service agreements with verbatim reporting services. For further information or copies of the guidelines, please contact the IPC.

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Communications Branch
Information and Privacy Commissioner/Ontario
80 Bloor Street West, Suite 1700
Toronto, Ontario, M5S 2V1

Telephone: (416) 326-3333
Toll Free: 1-800-387-0073
Fax: (416) 965-2983

Cette publication est également disponible en français.

Considerations in the Exercise of Discretion

There are a number of provisions found within both the provincial and municipal *Acts* which permit the heads of institutions to exercise discretion in determining whether records containing general or personal information should be disclosed. These discretionary exemptions are sections 13(1), 14(1), (2) and (3), 15, 16, 18, 19, 20, 22 and 49 of the provincial *Act*. The provisions in the *Municipal Freedom of Information and Protection of Privacy Act* are sections 6(1), 7(1), 8(1), and (2), (3), (no equivalent section 16), 11, 12, 13, 15 and 38.

Typically, a head will be called upon to exercise his or her discretion when a requester seeks access to a record to which one of the discretionary exemptions might apply. In these cases, the head may either choose to release the document, or to rely on one or more of the discretionary exemptions.

The exercise of discretion is an important obligation which institutions must undertake carefully. In order to assist both requesters and institutions to understand the exercise of discretion, the Office of the Information and Privacy Commissioner has prepared a list of factors which a head might consider in determining whether or not to release records.

The list of factors which follows is not intended to be exhaustive or definitive. Rather, it is designed to be helpful and illustrative, bearing in mind that the exercise of discretion often depends on the circumstances of the case. The following should be considered.

- a) The general purposes of the *Acts*, which are that institutions should make information available to the public and that individuals should have access to personal information about themselves.
- b) The actual wording of the discretionary exemption and the interests which the section attempts to balance.
- c) The facts and circumstances of the specific case.
- d) Whether the individual's request could be satisfied by severing the record and by providing the requester with as much information as is reasonably practicable.
- e) The historical practice of the institution with respect to the release of similar types of documents.
- f) The nature of the record, its importance to the requester and the extent to which the document is significant and/or sensitive to the institution.
- g) Whether the disclosure of the information will increase public confidence in the operation of the institution.
- h) The age of the record.
- i) Whether there is a sympathetic or compelling need to release the materials.
- j) Whether previous orders issued by the Commissioner have ruled that similar types of records or information should or should not be subject to disclosure.
- k) When the advice to government exemption is claimed, whether the decision to which the advice or recommendations pertains has already been made.

